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IN THE
COURT OF APPEALS OF INDIANA

DANNY J. SHULER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 67A01-0709-CR-438
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PUTMAN CIRCUIT COURT
The Honorable Matthew L. Headley, Judge
Cause No. 67C01-0611-FA-127

April 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Danny J. Shuler appeals his convictions for Class A felony dealing in methamphetamine, Class C felony possession of methamphetamine, and Class A misdemeanor possession of paraphernalia. Shuler contends that the trial court erred by admitting evidence of a document found in his backpack and that his convictions for dealing in methamphetamine and possession of methamphetamine violate the prohibition against double jeopardy. Finding that Shuler has waived review of any argument regarding the admission of evidence because he did not object at trial (and waiver notwithstanding, the admission of the document was not erroneous) and that Shuler's convictions for dealing in methamphetamine and possession of methamphetamine violate double jeopardy, we affirm in part, reverse in part, and remand with instructions to vacate Shuler's conviction and sentence for possession of methamphetamine.

Facts and Procedural History

During the early morning hours of November 2, 2006, John Regster and his girlfriend, Jennifer Keifer, both of whom lived in Terre Haute, went into the Hyatt Regency Hotel in Indianapolis and ran into Shuler, who Regster knew from Terre Haute. Shuler asked Regster for a ride back to Terre Haute, and Regster agreed. Regster and Keifer went up to Shuler's hotel room at the Hyatt so he could gather his belongings. While waiting in Shuler's hotel room, Regster met an unidentified man who was using a computer and who offered Regster some methamphetamine. After Regster smoked some methamphetamine, he, Keifer, and Shuler, who was carrying two bags—a duffel bag and a backpack—went to Regster's Ford Explorer. Shuler put his two bags in the back of

Regster's Explorer and got into the back seat. Keifer rode in the front passenger seat, and Regster drove.

As Regster was driving on Interstate 70 in Putnam County, he caught the attention of Putnam County Sheriff Deputy Benjamin Pyatt by driving under the posted speed limit. Regster crossed the shoulder line twice and went across the center lane, and Deputy Pyatt stopped Regster for a lane violation. Deputy Pyatt went up to Regster's car, noticed some suspicious behavior, and asked Regster if he had anything illegal in his car. Regster responded, "I don't" and put "an emphasis on the I." Tr. p. 137. The deputy asked Regster for permission to search his car, and Regster consented.

Deputy Pyatt had another deputy come out with his drug dog, and the dog indicated that drugs were present in back of Regster's car. Deputy Pyatt then searched Shuler's two bags. In the duffel bag, the deputy found a device used to smoke methamphetamine, and in the backpack, he found a brown paper bag containing seven bags of a white crystal substance. One of the bags was later tested and determined to contain 27.73 grams of methamphetamine, and the total weight of the seven bags was 81.4 grams. The backpack also contained 20.53 grams of a substance used to cut or water down methamphetamine and a document printed from a Doxpop website. Doxpop is an internet service provider that allows a person with a Doxpop account access to various courts' dockets and records. The Doxpop document contained Shuler's name and date of birth and a docket entry regarding a prior charge against Shuler for dealing in methamphetamine. Regster told Deputy Pyatt that the two bags belonged to Shuler.

When Deputy Pyatt asked Shuler if the bags were his, Shuler told the deputy that he did not want to talk to him without a lawyer.

The State charged Shuler with dealing in methamphetamine as a Class A felony,[1] possession of methamphetamine as a Class C felony, and possession of paraphernalia as a Class A misdemeanor. On the day of Shuler's jury trial, he filed a motion in limine, seeking to exclude any reference to Shuler's prior criminal charges as contained in the Doxpop document.[2] The parties discussed the motion prior to trial, and the State had already planned to redact any reference to Shuler's pending charges from the Doxpop document. Shuler also argued that he did not want the State to redact any information on the Doxpop document regarding the Doxpop account holder and contended that the State would not be able to authenticate the document because the document was printed from the Doxpop account of someone other than Shuler. The State agreed not to redact the Doxpop account holder from the document, and the trial court granted Shuler's motion in limine regarding any reference to Shuler's prior criminal charges.

During trial, the State moved to admit into evidence the Doxpop document found in Shuler's backpack, and Shuler did not object. The jury found Shuler guilty as charged. The trial court sentenced Shuler to thirty years with six years suspended for his dealing in methamphetamine conviction, four years for his possession of methamphetamine conviction, and one year for his possession of paraphernalia conviction, and the trial

[1] Although Shuler did not include a copy of the charging information in his Appellant's Appendix, the trial court's instructions to the jury contained in the Transcript indicate that Shuler was charged with dealing in methamphetamine based on his possession of methamphetamine with intent to deliver.

[2] This motion in limine was apparently Shuler's second motion in limine. Shuler did not include a copy of this second motion in limine in his Appellant's Appendix.

court ordered the sentences to be served concurrently. Thus, the trial court ordered Shuler to serve an aggregate executed term of twenty-four years.

Discussion and Decision

I. Admission of Evidence

Shuler argues that the trial court erred by admitting the Doxpop document into evidence because the document was not properly authenticated and because it constituted inadmissible hearsay. Although Shuler filed a motion in limine regarding the Doxpop document, he did not object to the admission of this evidence at trial. In order to preserve error in the trial court's ruling of a pre-trial motion in limine, the appealing party also must object to the admission of the evidence at the time it is offered, and the failure to object at trial to the admission of the evidence results in waiver. *Warren v. State*, 757 N.E.2d 995, 998 (Ind. 2001); *McCarthy v. State*, 749 N.E.2d 528, 537 (Ind. 2001). Because Shuler did not object at trial when the State moved to admit the Doxpop document into evidence, he has waived appellate review of any argument regarding the document's admissibility.

Waiver notwithstanding, the trial court properly admitted the Doxpop document into evidence. The admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for abuse of discretion. *Hill v. State*, 825 N.E.2d 432, 435 (Ind. Ct. App. 2005). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

Shuler contends that the document contains inadmissible hearsay and was not sufficiently authenticated. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). "The admission of documentary evidence at trial requires the proponent to show that the evidence has been authenticated, or simply put, that the evidence 'is what its proponent claims.'" *Craig v. State*, 730 N.E.2d 1262, 1266 (Ind. 2000) (quoting Ind. Evidence Rule 901(a)).

The State contends that the trial court properly admitted the Doxpop document—which asserted Shuler's name and date of birth, the Doxpop account holder's name, and the fact that Shuler's name was listed on a system that kept track of court cases—because the State did not offer the document to prove any of these matters asserted within the document. In other words, the State contends that the Doxpop document was not hearsay because it was not offered to prove the truth of the matters asserted in the document. In support of its argument, the State cites to *Ashley v. State*, 493 N.E.2d 768 (Ind. 1986).

In *Ashley*, the defendant challenged the trial court's admission of documents found in a car that the defendant had stolen and then abandoned. *Id.* at 773. The documents included a certificate of graduation in the defendant's name from a barber school, an envelope addressed to the defendant from a utility company, and an appointment calendar containing the defendant's identification information. *Id.* The defendant argued that these documents were inadmissible because they were hearsay and not properly authenticated. *Id.*

Our Supreme Court held the trial court properly admitted these documents into evidence because they were not hearsay and were not required to be authenticated. *Id.* at 773-74. Specifically, in regard to the defendant's hearsay argument, the *Ashley* Court explained that "[t]hese documents were not offered to prove that [the defendant] was a certified barber, that he corresponded with a utility company, or that he had a busy appointment calendar. These documents were clearly not offered for the proof of the matter contained therein, and therefore are not hearsay." *Id.* at 773. In regard to the authentication of these documents, the *Ashley* Court explained:

> We usually consider the question of authentication of documents when their legal significance pertains to their execution, authorship, or content. In this case, we find it unnecessary to address the adequacy of the authentication; the purpose of the evidence did not require that the documents be authenticated. The authorship or execution of the documents is not in issue, nor is the content of the documents central to the case. The purpose of offering the documents was merely to show their own existence, and, more particularly, their existence in the stolen vehicle. "When the execution of a document is not in issue, but only . . . the fact of the existence of a document of such tenor, no authentication is necessary." 4 *Wigmore on Evidence* § 2132, at 714. The unauthenticated documents were properly admitted.

Id. at 773-74 (footnote omitted).

Just as the documents in *Ashley*, the Doxpop document was not offered to prove Shuler's name and date of birth or any other matter asserted in the document. Because the document was not offered to prove the truth of the matters contained therein, it was not hearsay. *See id.* at 773. Additionally, as in *Ashley*, it is unnecessary to address the adequacy of the authentication of the Doxpop document because the purpose of the evidence did not require that the document be authenticated. *See id.* Here, the execution of the document was not in issue, and the content of the document was not central to the

case. The purpose of offering the Doxpop document was merely to show its own existence, and more particularly, its existence in the backpack that contained the methamphetamine. Accordingly, no authentication was necessary. *See id.* at 773-74. Because the Doxpop document was not hearsay and did not require authentication, the trial court did not abuse its discretion by admitting the document into evidence.

II. Double Jeopardy

Shuler also argues that his convictions for dealing in methamphetamine and possession of methamphetamine violate the prohibition against double jeopardy under Indiana Code § 35-38-1-6 because his possession of methamphetamine conviction was a lesser-included offense of his dealing in methamphetamine conviction.

Indiana Code § 35-38-1-6 provides that if a defendant is charged with an offense and an included offense in separate counts and is found guilty of both counts, "judgment and sentence may not be entered against the defendant for the included offense." Indiana Code § 35-41-1-16 provides, in part, that an "included offense" is an offense that: "(1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged[.]" A lesser-included offense is necessarily included within the greater offense if it is impossible to commit the greater offense without first having committed the lesser offense. *Bush v. State*, 772 N.E.2d 1020, 1023-24 (Ind. Ct. App. 2002), *trans. denied*; *Iddings v. State*, 772 N.E.2d 1006, 1016 (Ind. Ct. App. 2002), *trans. denied*.

The State acknowledges that the same evidence—Shuler's possession of methamphetamine in his backpack—was used to establish Shuler's possession of

methamphetamine offense as well as the possession element of his dealing in methamphetamine offense, thereby making his possession of methamphetamine a lesser-included offense of his dealing in methamphetamine conviction. Accordingly, we conclude that the trial court erred in entering conviction against and sentencing Shuler for the lesser-included offense. *See* Ind. Code § 35-38-1-6. Therefore, we remand this case to the trial court with instructions to vacate Shuler's conviction for possession of methamphetamine.

Affirmed in part, reversed in part, and remanded.

SHARPNACK, J., and BARNES, J., concur.